Supreme Court, U.S.
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In The Supreme Court of the United States

ESTATE OF J. D. DAVIS AND J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS,

Petitioners,

v.

DOROTHY L. DAVIS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee, Middle Section At Nashville

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in probating a will of a deceased husband who was a domiciliary of Tennessee, the Tennessee courts may constitutionally (under the Full Faith and Credit provision of Article IV, §1) decline to enforce an antenuptial agreement at the behest of the surviving wife, a domiciliary of Florida, on grounds that the relevant Florida statute, which validates enforcement of the antenuptial agreement, violates the "public policy" of Tennessee, even though:

- Tennessee's choice-of-law rules dictate that the antenuptial agreement "be construed under Florida law" (App. at A-6);
- Under Florida law, the antenuptial agreement is valid and enforceable (App. at B-2);
- No evidence indicates that either husband or wife intended the agreement to be construed under Tennessee law (App. at A-6);
- Tennessee law recognizes that antenuptial agreements are to be "interpreted and enforced like any other contracts" (*Soloman v. Murrey*, 2002 Tenn. App. LEXIS 734, at *9 (2002) (construing Tenn. Code Ann. §36-3-501));
- Tennessee law recognizes that husband and wife, as in this case, may have separate domiciles (*Younger v. Gianotti*, 138 S.W.2d 448 (Tenn. 1940)); and
- The Tennessee courts made no choice-of-law or other analysis showing that Tennessee courts were constitutionally authorized to disregard otherwise-applicable Florida law.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Estate of J. D. Davis and J. Douglas Davis and Julie Ann Davis Griffin, co-executors, respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Tennessee in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A-1 through A-17) was entered on September 2, 2004, and is reported at 2004 Tenn. App. LEXIS 585. The unreported order of the Tennessee Supreme Court denying review was entered on February 28, 2005. (App. C-1) The unreported order of the Tennessee Supreme Court denying the Petition for Rehearing was entered on May 2, 2005. (App. D-1) The unreported order of the Davidson County Circuit Court (Probate Division), granting Petitioners' motion for summary judgment and dismissing Respondent's claims with prejudice, was entered on April 23, 2003. (App. B-1 through B-3)

JURISDICTION

The Court of Appeals entered its judgment on September 2, 2004. (App. A-17) Petitioners timely filed an Application for Permission to Appeal with the Tennessee Supreme Court on October 28, 2004. (App. C-1) On February 28, 2005, the Tennessee Supreme Court denied permission to appeal. (App. C-1) On March 10, 2005, Petitioners timely filed a Petition for Rehearing. (App. D-1) On May 2, 2005, the Tennessee Supreme Court denied

the Petition for Rehearing. (App. D-1) This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of Article IV, §1 (the Full Faith and Credit Clause) to the United States Constitution, the federal full faith and credit statute (28 U.S.C. §1738), and the relevant provisions of Tennessee and Florida law are set forth in Appendix E.

STATEMENT OF THE CASE

In General. The constitutional issue in this matter is Petitioners' Full Faith and Credit Clause (FFC) challenge to the Tennessee Court of Appeals' use (or mis-use) of the "public policy" doctrine to nullify Tennessee's choice-of-law principles and deny enforcement of an antenuptial agreement made in Florida and enforceable under Florida law. As applied by the Tennessee Court of Appeals herein, the one-dimensional "public policy" doctrine "threatens the fundamental conceptions [of federalism] underlying the entire conflicts law." Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 971 (1956).

Under Tennessee's choice-of-law rules, Florida law controls enforcement of the agreement. (App. A-6) No evidence indicates that either party to the agreement (husband or wife) intended the agreement to be construed under Tennessee law. (App. A-6) Tennessee recognizes that antenuptial agreements are to be "interpreted and

enforced like any other contracts," *Soloman v. Murrey*, 2002 Tenn. App. LEXIS 734, at *9 (2002) (construing Tenn. Code Ann. §36-3-501), and that husband and wife, as in this case, may have separate domiciles (*Younger v. Gianotti*, 138 S.W.2d 448 (Tenn. 1940)).

The Court of Appeals in this case acknowledged that Tennessee's choice-of-law principles required application of Florida law and enforcement of the antenuptial agreement. (App. A-6) Nevertheless, the court declined to give effect to Tennessee's choice-of-law principles or to Florida law in this case. It used "public policy" doctrine as a one-dimensional "roving ... 'exception'" to conventional choice-of-law analysis in order to substitute Tennessee law for Florida law. *See Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). In the process, the Court of Appeals failed to take into account the federalism-based constitutional principles that inhere in choice-of-law analysis. *See* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 112 (1991) (noting that "federalism" is the "key constitutional concept in interstate relations" as embodied in FFC).

The Court of Appeals' decision was based on a raw, one-dimensional preference for the substantive content and outcome of the relevant Tennessee laws. It did not take into account the critical threshold issue of whether Tennessee had authority to follow its own law – whether it was "competent to legislate" on the matter. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003) (internal cite omitted). That requires examination of whether there was any "occurrence" or something to be done "to which the law of [Tennessee] could apply." *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936). *See also Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

Further, the Court of Appeals did not address the obligations that Tennessee might have, under principles of federalism embraced in FFC, to give recognition to and enforce the law of another state. *See, e.g., Broderick v. Rosner*, 294 U.S. 629 (1935). Nor did the one-dimensional analytical approach of the Court of Appeals take into account other critical elements of FFC such as the "element of unfair surprise or frustration of legitimate expectations as a result of [Tennessee's] choice of its law." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981) (plurality). In short, by focusing exclusively on the "public policy" of Tennessee, the one-dimensional analytical approach of the Court of Appeals was bereft of the necessary components of a multi-dimensional FFC analysis that addresses or takes into account the nuanced, constitutionally-mandated elements of FFC doctrine.

That mode of analysis has been described as a "traditional but dubious use of the term 'public policy' to obscure [what is really] 'an assertion of the forum's right to have its [own] law applied to the [controversy] because of the forum's relationship to it.'" *Baker,* 522 U.S. at 233 n.6 (internal cite omitted). Invocation of "public policy" in such circumstances is a *deus ex machina* that disregards or even undermines the careful consideration of multi-dimensional constitutional principles of federalism that undergird choice-of-law doctrine under FFC.

By focusing solely on outcome, on the divergent content of the Florida and Tennessee laws, and on the expression of preference for the substance of Tennessee's law, the Court of Appeals avoided consideration of the kind of "functional analysis of the choice-of-law" problem mandated by FFC principles. As the author of a leading treatise puts it, "[u]nder no circumstances should a forum

use public policy to apply its own law on the merits. Choice of forum law should be justified by a complete choice-of-law analysis." RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAWS 109 (4th ed. 2001). That did not happen in this case; that type of evasion, all too characteristic, risks an end-run around core FFC principles – mandated by considerations of federalism – by casting them into the bin of doctrinal desuetude.

The "public policy" doctrine has been described by Stanford Law School Dean Larry Kramer as "among the hoariest of hoary conflicts doctrines," calling for judicial clarification because of the "relative degree of disarray in the states." Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1966, 1979 (1997). Dean Kramer's sentiment is echoed by University of Texas Law School Associate Dean Douglas Laycock, who has characterized the doctrine as a "relic carried over from international law." Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 313 (1992). As in this case, "public policy can serve as a substitute for thinking," a form of "intellectual laziness" about choice-of-law rules. Paulsen & Sovern, *supra*, 56 COLUM. L. REV. at 987.

The Court of Appeals declined to apply otherwise-controlling Florida law under Tennessee's choice-of-law rules. The sole reason was that, based on its content, the relevant Florida law purportedly was at odds with Tennessee public policy. No analysis of choice-of-law principles took place; no consideration of Tennessee's obligation to the law of Florida occurred; no consideration was given to Tennessee's obligation to implement the choices of the

parties to the agreement; and no analysis took place of the constraints on Tennessee's authority to protect the interests of a non-domiciliary who had made an agreement that was legally binding and enforceable in her state of domicile (Florida). *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996) (principles of state sovereignty limit the ability of a state to encroach on "policy choices of other States" and confine a state's ability to act in certain circumstances to "protecting its own consumers and its own economy"); *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003) (same). Only considerations of Tennessee's own interests mattered; the bare assertion was made that generally applicable Tennessee choice-of-law principles would not apply because the result of the choice-of-law analysis would conflict with Tennessee's public policy.

That circumvention of longstanding choice-of-law doctrine can effectively abrogate or marginalize the federalism-derived constitutional constraints that underlie FFC and that this Court has built into choice-of-law principles under FFC.

While it is true that FFC analysis no longer encompasses balancing the interests of one state against that of another, *Franchise Tax Bd.*, 538 U.S. at 498-99, it also is true that FFC analysis does require consideration of the proper and properly delimited scope of authority of a forum state to legislate on a matter, to disregard the law of another state, and unfairly to surprise or frustrate parties' expectations. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985); *Allstate Ins. Co.*, 449 U.S. at 312-13, 318 n.24.